

The Importance of Preserving Heritage Resources

The text that follows is taken from an address that was presented to the "Overview of Archeological and Historic Resources Law" training course on June 12, 1996, by Elizabeth Osenbaugh, then Counselor for State and Local Environmental Affairs in the Environment and Natural Resources Division of the Department of Justice. These remarks underscore the commitment of the Environment and Natural Resources Division to archeological and historic resources, as well as items of ongoing historical, traditional, or cultural significance for a district, the nation, or a living culture.

"Overview of Archeological and Historic Resources Law" provides federal departmental and agency counsel with information that enables them to interpret laws and regulations, clarify federal responsibilities, articulate current policies, and complete casework relating to heritage resources. It is co-sponsored by the National Park Service and the Office of Legal Education, Executive Office of United States Attorneys, Department of Justice. The 1996 training was made possible, in part, with special funding by the National Park Service through its Preservation Partnerships Training Initiative.

I am very pleased to be here today to express the Environment Division's commitment to protection of historic resources. This commitment is part of the Administration's overall dedication to preserving our historic and cultural heritage. As you may know, the President recently signed Executive Orders on locating federal facilities on historic properties (May 21, 1996) and protecting Native American access to sacred sites (May 24, 1996).

Why is it important to protect archeological and historic resources?

- Archeological and historic resources provide a sense of place. The Attorney General often discusses the environment in terms of the importance that a "special place" has for each of us. For her, it's the Florida Everglades; for me, it's the Iowa prairie. So, too, do buildings and cultural artifacts evoke the sense of home or a shared past, which provides that critical sense

of belonging to our community and to our country.

- Archeological and historic resources make prior experience meaningful and immediate—as the National Archives building proclaims, "What is past is prologue."

Actual contact with historic sites or documents illuminates that past with intensity. This contact in turn makes historic experiences real—and hopefully gives us meaningful information and wisdom as we develop and implement government policy.

- Archeological and historic resources help us understand the present and our role in the continuum of time—as William Faulkner said, "The past is never dead; it isn't even past."^{*} Further, like the monks illuminating manuscripts they could not read, we may serve as instruments to preserve these historical materials until they can be more fully understood.
- Archeological and historic resources provide a sense of local and national community—the terrible burnings of black churches in the South illustrate the significance of cultural, architectural, and community resources to a community. The buildings themselves are significant symbols of the communities, which we must protect from attack.
- By protecting resources that are special to the culture of a community, we show our respect for that community and preserve the diversity of the broader American culture.

What can government lawyers do to protect these resources?

- We can prosecute those who steal or destroy historic and cultural resources in violation of law. Yesterday's *Washington Post*, for example, contained a story about a man who allegedly visited libraries up and down the East Coast, stealing maps and ancient documents. If true, this is theft of public property, which unlike money or computers, can never be replaced, once lost.
- We can educate the public. Much damage to archeological and historical sites may be caused by those who love history and want their "own piece of it." We need to educate the

public as well as relic hunters and other collectors to assure that there is understanding both of the existing laws and of the adverse impact amateurs can unknowingly cause.

- We can develop good agency records to support decisions that affect third parties and to assure that those decisions are reasonable and supported by the record.

When I was in the Iowa Attorney General's office, the state archeologist asked for assistance regarding the discovery of an ancient burial mound on a platted lot in a new subdivision.

The mound was discovered after a 60-acre farm had been subdivided into lots—and the lot in question had been sold for \$50,000. The state archeologist ordered the developer to leave the mound undisturbed. As the mound was in the center of this lot, the homeowner could not build a house on the lot. The developers bought the lot back from the buyer as required by their contract warranting that the land was fit for residential development. The developers notified the state it would claim entitlement to compensation for a “taking” of its property under the Fifth Amendment. However, the developers from the outset claimed they had no objections to the determination of the state archeologist that this was a historically-significant mound and that nothing could be built on the mound without destroying it. Nonetheless, we wanted to be sure that there was a complete record supporting the land use restriction, in anticipation of the subsequent takings case. We assured that the record established the reasonableness of the agency action and that the developer's admissions, as well as other critical facts, were established in the record. Throughout the process, down to responding to statements in the *amicus* briefs in the United States Supreme Court, it was necessary to establish time and again that the decision to prohibit building was reasonable and not broader than necessary.

The trial court and the Iowa Supreme Court held that the state archeologist's refusal to permit excavation and building on the burial mound was not a taking requiring the payment of compensation. *Hunziker v. State*, 519 N.W.2d 367 (Iowa 1994), cert denied, U.S. 115 S.Ct. 1313, 131 L.Ed. 2d 195 (1995). The court concluded that the developers' “bundle of rights” never included the right to disinter the bones as the applicable statutes preceded the developers' purchase of the farm. The state had also argued that the developers never had a right to disrupt human graves at common law. The briefs clearly established that Iowa has protected graves since its days as a territory. That common law and the Iowa Burial Protection Act of 1976 both pre-

dated the developer's purchase of the land—and certainly the mound itself long pre-existed the developer's expectancies. Because the developer never had the right to excavate and destroy the mound, its discovery and the consequent decision of the state archeologist did not constitute a taking.

The Iowa Supreme Court also ruled that the loss of \$50,000 plus \$7,000 in refunded architectural fees was *de minimis*, considering that the developer purchased the 60 acres for approximately \$500,000 and received more than four million dollars for sale of the other 123 lots.

The developer filed a petition for *certiorari* with the United States Supreme Court. Several *amicus* briefs were filed by the Iowa Farm Bureau Federation, Mountain States Legal Foundation, Alliance for America, and National Association of Homebuilders. *Hunziker* was presented in conference at the Supreme Court three times before *certiorari* was denied. I believe *certiorari* was denied because the record was strong on the reasonableness of the decision, as well as on the strength of the legal authorities addressed by the Iowa Supreme Court.

- You who attend this seminar can provide expertise to other government lawyers and agency personnel. Often action to protect sites must be taken quickly—and often those bringing the action are not experts in archeological law or historic protection. It is important that the “general practitioners” in the offices of U.S. Attorneys, local prosecutors, and state attorneys general know whom to call for help as these cases arise. When we were working on *Hunziker* we happened to get seminar materials from the Park Service and got David Tarler's phone number. He was helpful in informing us of cases in other jurisdictions.

It is critical that government attorneys be versed in the laws designed to protect these non-renewable resources and to prevent the destruction and disruption of our heritage. Through courses such as this, it is my hope that you will all gain a familiarity with and an appreciation for preservation law so that you can use these important statutes to achieve their purposes.

Role of the Environment Division

Within the Department of Justice, much of the direct enforcement of criminal laws is handled by the United States Attorneys offices in the various districts. The Criminal Division provides assistance to assistant U.S. Attorneys as they develop these cases.

The Attorney General has also established an Office of Tribal Justice to coordinate departmental policy on matters affecting Indian tribes. We work closely with that office.

The Environment and Natural Resources Division (ENRD) handles civil cultural and historic resource cases at the national level. This is appropriate as these resources are integral to the environment that we strive to protect every day. The ENRD is very interested in working with federal land managers and the United States Attorneys' offices to explore appropriate cases for enforcement. Additionally, we work with agencies daily to ensure that federal agencies comply with preservation laws.

Our General Litigation Section has attorneys with expertise in such preservation laws as the Native American Graves Protection and Repatriation Act, otherwise known as NAGPRA, the Antiquities Act, the National Environmental Policy Act or NEPA, the Abandoned Shipwreck Act, and the National Historic Preservation Act. One of those attorneys, Caroline Zander, presented the "Nuts and Bolts of Archeological and Historic Resource Law" and a lecture on the Antiquities Act at this seminar. Federal, state, and local attorneys should feel free to call Caroline and others listed in the "contacts" list (see box).

The Indian Resources Section is largely devoted to the protection and promotion of tribal rights including resource rights. This Section is uniquely suited to handle violations that occur on Indian lands, including violation of historic and archeological preservation statutes. ENRD, along with Justice's Office of Tribal Justice, will be the key coordinators on the sacred sites executive order.

Our Land Acquisition Section is sometimes called upon to condemn properties being acquired for their historic significance. It has, for example, filed condemnation actions to acquire lands for inclusion in the Antietam National Battlefield and the Lowell National Historical Park.

The Division's Policy, Legislation, and Special Litigation Section, or PLSL as it is more commonly known, plays a key role in coordinating

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policy within the Division and with other federal agencies. PLSL works closely with the Department's Office of Tribal Justice on all matters implicating Indian Tribes and their resources. The Indian Resources Section's Senior Counsel Kalyn Free is also working to improve federal/tribal coordination of environmental enforcement issues in Indian Country. The Division welcomes your calls to discuss potential litigation or policy issues.

Note

* William Faulkner, *Requiem for a Nun*.

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